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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/685,756	10/14/2003	Richard Ticktin	SLBS-003	6153

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EXAMINER	
WEINSTEIN, STEVEN L	
ART UNIT	PAPER NUMBER
1761	

DATE MAILED: 04/13/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

PTO-90C (Rev. 10/03)

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## *Office Action Summary*	**Application No.** 10/685,756	**Applicant(s)** TICKTIN, RICHARD	
	Examiner Steven L. Weinstein	**Art Unit** 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on 30 January 2006.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-17,20-34 and 36-44* is/are pending in the application.

4a) Of the above claim(s) *3,4,10,12,14,22-31,34 and 36* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1,2,5-9,11,13,15-17,20,21,32,33 and 37-44* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1,2,5-9,11,13,15-17,20,21,32,33, and 37-44 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bernotavicz (3,985,904) in view of Renault (5,816,451), Redmond (6,651,848), Nishimura (JP2002-262778) and Rittmeyer (WO 01/51359), further in view of Kaplow et al (3,694,233), J. of Food Science (41,4, p.918-921,1976), J. of Food Science (40,1, 137-139, 1975), and Food Science (Potter, 1973), for the reasons fully and clearly detailed in the Office action mailed 1/30/06.

Claim 1 now recites that the Aw is from about .8-.875. Bernotavicz chooses to employ a food product with a Aw of at least about .9 because he is interested in a food product with a higher moisture content. It is noted that applicants own originally disclosed and claimed range (about .8 - about .95) included the range of Bernotavicz. Implicit in the teachings of Bernotavicz is that it was conventional to employ the now narrower recited range. In fact, Bernatavicz teaches that prior to his invention, no one had developed an animal food with a Aw above about .9 which was still stable against mold and bacterial growth. Thus, Bernaotavicz clearly teaches that it would have been obvious to employ a lower Aw than .9, to achieve shelf stability, if one is willing to accept a product of lower moisture. In fact, that was the state of the art before his invention. Bernotavicz teaches that the shelf stability is achievable through the manipulation of Aw, ph, and antioxidants/preservatives, which appears to be applicants objective and solution. Kaplow et al, J.of Food Science (1976), J. of Food Science (1975) and Potter are cited as further evidence that the recited Aw is notoriously conventional in the art for producing shelf stability. Claim 1 now narrows the range for shelf stability to at least about 4 days to about 1 month for multiple servings. Note that multiple servings are not seen to be a positive recitation in the claim. That is, the claim does not recite the dispenser has multiple servings. Also, note that the claim is readable on remaining stable for only 4 days. In any case, as discussed in the last Office action and above, Bernotavicz discloses that by the manipulation of the known variables for shelf stability, he is able to product a product that is as stable as the conventional products that possessed a lower Aw and thus was less moist. The products of Bernotavicz with or without the Aw would be expected to possess the properties and meet the functional statements of intended use; including opening and reclosing the tube. Claim 17 now recites that the antioxidant is one of propyl or methyl paraben. Bernotavicz disclose antioxidants in combination with Aw, ph reducing agents and otherp preservatives, but is silent in regard to the use of parabens. As evidenced by both J. of Food Science articles, not only are the parabens conventional food preservatives, they have been used together with Aw in the recited range and lowered ph to preserve intermediate moisture foods. To modify the combination and employ the parabens for their art recognized and applicants intended function is therefore seen to have been obvious. All of the remainder of the claims have been carefully reviewed and recite limitations previously considered or considered above and are rejected for the reasons given in the last Office action and above.

All of applicants remarks filed 1/30/06 have been fully and carefully considered but are not found to be convincing. The art taken as a whole teaches packaging pet food of intermediate moisture content in squeeze tubes wherein the product has good shelf stability. This is exactly applicants objective as well. It is urged that Bernotavicz does not suggest a Aw of less than .9 or use of the food product for multiple servings. This urging is totally unconvincing. As discussed above, and contrary to what has been urged, Bernotavicz recognized that Aw of less than .9 stifled the growth of bacteria. Berotavicz further disclosed he could get the same result for higher moisture foods (i.e. Aw>.9 if the appropriate combination of ph, preservative and antioxidant was provided. The products produced by Bernotavicz and the art taken as a whole would inherently be expected to have the storage stability functionally claimed (i.e. stable after several openings) because the art taken as a whole teaches the products are substantially pathogen free. There is nothing in the record, in terms of comparative data or convincing urgings, that the art taken as a whole would not have the stability property. How can one argue that Bernotavicz does not inherently have the stability property recited because of his Aw of >.9 when applicants specification teaches a range of Aw from .8-.95? It is also noted that at least some of the claims only recite a Aw and then this functional property of stability when it is clear from the art taken as a whole that ph, preservatives and antioxidants all play a role in shelf stability. It is urged on page 10 of the amendment that Bernotavicz would likely spoil after being initially unsealed in a matter of a few days. This urging is speculative opinion not supported by any convincing probative data. Note, too, that Kaplow discloses that, by virtue of the built-in microbial stability (due of course, to the conventional factors known to be manipulated in shelf stable applications), leaks, pinholes, etc, will not give rise to spoilage (col.6, para. 1). Thus, Kaplow teaches that if the built in microbe stability is sufficient, the product can be shipped and stored under nonrefrigerated conditions without being completely sealed or closed and the product will not spoil. The evidence therefore for applicants result being an expected result far outweighs the evidence that the result is unexpected (the latter being no evidence). It is also urged that Bernotavicz employs a tooth paste size tube. Bernotavicz says nothing about size of the tube. He only refers to the tube as the type of tube used for tooth paste which means a flexible, squeezable tube. As discussed previously, the amount of food and whether one choose to provide food for one serving or several servings, is seen to have been an obvious matter of choice. As for the issue of opening and reclosing the cap, if the container was opened, closed and opened again, with the product stored closed between openings, since the product of the prior art is at a Aw appropriate for shelf stability, has a low ph, and contains preservative and antioxidant, there is no reason to expect or believe that the product would not fare well in the recited functional scenario or in the steps of the method. Many products come in multiple servings including toothpaste. Finally, it is urged that parabens are effective to extend stability after initially unsealing the product. There is nothing in the record that discloses or suggests that the parabens, being an antioxidant, works any better than any other conventional antioxidant disclosed by applicant. Also, as evidenced by the newly cited art, parabens have been used in the intermediate moisture content environment. In summary, applicant has taken a conventional product containing conventional additives fully disclosed by the art taken as a whole, places the product in a conventional container known to be used for the conventional product as is also shown by the art taken as a whole and achieves no new or unexpected result therefrom. To place multiple servings of the product into Bernotavicz is seen to have been an obvious to do (not an obvious to try) in view of the art taken as a whole.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Steven L. Weinstein whose telephone number is 571-272-1410. The examiner can normally be reached on Monday-Friday from 7:00AM to 2:30PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano, can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Steve Weinstein
STEVE WEINSTEIN 1761
PRIMARY EXAMINER
4/11/06